

Laissez-“Fair”: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators

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I. INTRODUCTION

The lawyer as a negotiator is assuredly one of the most significant roles that an attorney will play during the course of his career. The act of negotiation itself is a pervasive element of an attorney's practice; commercial contracts, settlement agreements and employment contracts, must all be negotiated. Even the lawyer's relationships with both his clients and his associates can be determined in large part by the negotiations that take place between them.¹ Furthermore, the growing concern about the adversary system's ability to deal with disputes quickly, fairly and economically has led to an increased interest in a wide variety of alternative dispute resolution methods.² Negotiation has become the most often used and relied upon method for resolving disputes in an efficient and cost-effective way.

Despite the prevalence of negotiation in the practice of an attorney, comparatively few ethical rules have been created to directly address the role of an attorney in the process of negotiation.³ One commentator asserts that “negotiators operate under primitive and obtuse rules of professional responsibility and under an amorphous set of professional mores common among lawyers.”⁴ Still others fear that negotiation, without significant ethical constraints to counteract the absence of judges and a formal adjudication process, creates controversial outcomes that rely more upon power and status than principled resolution.⁵ Because of the lack of specific ethical rules dealing with this area, numerous academics and practitioners

¹ See CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 1-2 (2d ed. 1993).

² See Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1387 (1986).

³ See discussion *infra* Section III.

⁴ Steele, *supra* note 2, at 1387.

⁵ See Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 497 (1989) (citing Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400).

have urged the adoption of additional rules of professional responsibility that would more directly constrain the lawyer as negotiator.⁶

While there has been a call for higher ethical standards for attorneys in this area, this Note will show that current rules provide adequate protection for the various competing interests involved in the negotiation process. Section II of this Note discusses the ethical rules that currently apply to attorneys while they are engaged in negotiation. More specifically, it shows how both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility ethically restrain the attorney as a negotiator. Section III provides some of the proposed additions to the rules of professional responsibility that have been suggested and articulates both the practical and professional rationales that have been offered in support of them. Section IV illustrates how the current ethical restraints, acting together with both professional considerations and market forces, are adequate restrictions on the behavior of attorneys acting in the negotiation setting. Finally, Section V reinforces this view by providing a market-type analysis of attorney conduct in negotiation. In addition, it demonstrates, through hypothetical situations, that additions to the current ethical standards would be superfluous and unnecessary in today's legal community.

II. THE CURRENT ETHICAL CONSTRAINTS ON LAWYERS AS NEGOTIATORS

Despite the prevalence of the negotiating process in the life of an attorney,⁷ very few ethical rules across the country directly address this aspect of a lawyer's life. This is not to say, however, that modern ethical rules do not have an indirect and significant influence on an attorney's negotiating behavior. Both the Model Rules of Professional Conduct

⁶ See, e.g., Robert B. Gordon, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 U. MICH. J.L. REFORM 503 (1985) (presenting a rationale for imposing duties of truthfulness on a lawyer negotiating a private settlement that are coextensive with an advocate's duty of candor towards the tribunal); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975) (calling for fairness in negotiations); Michael H. Rubin, *The Ethics of Negotiation: Are There Any?*, 56 LA. L. REV. 447 (1995); Steele, *supra* note 2, at 1403.

⁷ "Negotiated settlement is universally recognized as the preeminent and preferred alternative to trial litigation." Gordon, *supra* note 6, at 504-505 (citing SAMUEL D. THURMAN ET AL., CASES AND MATERIALS ON THE LEGAL PROFESSION 250 (1970)).

(Model Rules) and the Model Code of Professional Responsibility (Model Code)⁸ set up an ethical framework that can act as a guide for attorney behavior when conducting negotiations with third parties.

A. *Ethical Constraints on Attorney Conduct*

The Model Code has been noted by scholars as relying heavily on the adversarial process, and it constrains attorneys' behavior with respect to negotiations in the same manner. Under the Model Code, zealous advocacy of the client "within the bounds of the law" is the touchstone concept.⁹ As a result, the reliance on this key principle permeates both the Ethical Considerations and Disciplinary Rules contained throughout the Model Code. The Model Rules also value the attorney's duty to be a zealous advocate for his client, stating in its preamble that "[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."¹⁰

Where the bounds of the law are uncertain, the ethical boundaries of the lawyer may depend on whether he is serving as an advocate or advisor. A lawyer may serve simultaneously as both advocate and advisor, but the two roles are essentially different.¹¹ Model Code Canon 7, in its Ethical Considerations, states that while serving as advocate, a lawyer should

⁸ Jurisdictions are split on following the Model Rules or the Model Code, with the vast majority of states (excluding Ohio) electing to follow the American Bar Association's Model Rules of Professional Conduct. See Laws. Man. on Prof. Conduct (ABA/BNA) 01:3-01:4 (May 29, 1995).

⁹ Model Code Canon 7 provides in pertinent part: "A lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

¹⁰ MODEL RULES OF PROFESSIONAL CONDUCT Preamble cmt. 2 (1995).

¹¹ See Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). Eisenberg states:

Nowhere does the contrast between official processes and their private counterparts appear greater than between adjudication and negotiation. Adjudication is conventionally perceived as a norm-bound process centered on the establishment of facts and the determination and application of principles, rules, and precedents. Negotiation . . . is conventionally perceived as a relatively norm-free process centered on the transmutation of underlying bargaining strength into agreement

Id. at 638. See also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073 (1984).

resolve doubts as to the bounds of the law in favor of his client.¹² Similarly, the Model Rules subordinate, in large part, a requirement of honest dealing in negotiation to the ideal of an attorney's zealous advocacy of his client.

Generally, an attorney has no affirmative duties to non-client third parties. Responsibility to his client and the duty to zealously represent him require a lawyer to subordinate the interests of others to those of his client.¹³ This is a conscious policy decision made by the drafters of both the Model Rules and Model Code to insure that those needing representation by a member of the legal profession can acquire the strongest advocate for their interests.¹⁴ Any deviation from this current norm would jeopardize the coveted attorney-client relationship and change the role of an attorney from that of an advocate to one of "social policeman." This reliance on the strong protection of the attorney-client relationship displays itself in other areas of professional responsibility. Most notably, this can be seen in the fundamental area of confidentiality. Almost without exception, the lawyer is charged with maintaining the confidentiality of information relating to the representation of a client.¹⁵ Clients are thereby encouraged to communicate fully and frankly with their lawyers even as to embarrassing or legally damaging subject matter.¹⁶ The observance of this ethical obligation facilitates the full development of facts essential to the proper representation of the client and encourages people to seek early legal assistance. Much like confidentiality, the primary duty of an attorney to zealously represent his client's interests serves the same function. Only by closely tying clients to their attorneys and assuring clients of their attorneys' utmost loyalty can the proper and most efficient representation take place.

From the general duty of zealous representation comes one of the most important areas of negotiation ethics: misrepresentation.¹⁷ Generally, an attorney may not misrepresent any material fact. For example, Rule 4.1(a)

¹² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

¹³ See CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 439 (2d ed. 1992).

¹⁴ See *id.*

¹⁵ See CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, *supra* note 13, at 85.

¹⁶ See *id.*

¹⁷ See HON. EUGENE F. LYNCH ET AL., NEGOTIATION AND SETTLEMENT 170 (1992).

of the Model Rules forbids a lawyer to knowingly "make a false statement of material fact or law to a third person" ¹⁸ However, Comment 2 of Rule 4.1, interpreting this rule, states an important qualification:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiations certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category ¹⁹

Thus, by custom, attorneys are permitted (and even expected) to misrepresent to some extent not only what their clients would find acceptable, but also the extent of their own authority to settle. This issue lies at the heart of the dichotomy facing attorneys when entering negotiations with the highest "utopian" views of their ethical duties—that "[t]o mislead an opponent about one's true settling point, is the essence of negotiation." ²⁰ Thus, interpreting the rule, one may say that his client will not accept or authorize less than a certain figure while knowing the statement is not true. But one may not say falsely that the loss to his client exceeds a certain figure. ²¹ A leading text on negotiation gives these simple words of advice: "When in doubt . . . either tell the truth, decline to give a value, or generalize. *But do not lie.*" ²²

While this distinction may seem to contravene the underlying attempt to promote ethical behavior, it also promotes one of the most important ideals in professional responsibility—confidentiality. At the heart of this controversy over a lawyer's duty of truthfulness is the tension between the duty to maintain client confidences, ²³ and the obligation to refrain from assisting fraudulent or dishonest conduct of a client. ²⁴ Both the Model Code

¹⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) (1995); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3), DR 7-102(A)(5) (1980) (stating that a lawyer shall not "knowingly conceal or fail to disclose that which he is required by law to reveal . . . [or] knowingly make a false statement of law or fact.").

¹⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) cmt. 2 (1995).

²⁰ James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 928 (1980).

²¹ *See* LYNCH ET AL., *supra* note 17, at 170.

²² *Id.* (emphasis added).

²³ *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1980).

²⁴ *See id.* at DR 1-102(A)(4).

and the Model Rules make a policy judgment and resolve this conflict in favor of protecting privileged communications.²⁵ "Thus, any duty of candor or truthfulness that may exist in the negotiation context clearly yields to the duties of loyalty and zealous representation owed the client."²⁶

In addition, numerous other ethical constraints indirectly restrict an attorney's conduct while acting as a negotiator. For example, Model Code EC 7-10 maintains that lawyers should "treat with consideration all persons involved in the legal process"²⁷ Also, Model Rule 2.1 allows lawyers to consider moral issues in rendering their advice.²⁸ However, the professional responsibility rules do not offer much more in the form of guidance with respect to negotiation ethics. Both the Model Rules and Model Code deal largely with ethical constraints regarding actions before a tribunal. Neither set of ethical rules has chosen to directly interfere with the predominantly informal process of negotiation that occurs in the day-to-day activities of a practicing attorney.

B. ABA Rejection of Specific Rules Governing Negotiation Behavior

The fact that neither the Model Rules nor Model Code deals directly with the problems of an attorney as a negotiator is not the result of mere oversight or ignorance on the part of the American Bar Association (ABA).

²⁵ Model Code DR 4-101(C) permits a lawyer to discuss a client's confidences or secrets in only four narrow circumstances: (1) when the client consents (either explicitly or impliedly); (2) when permitted by a Disciplinary Rule or required by law; (3) when necessary to prevent a crime intended by the client; and (4) when necessary to establish or collect his fee or to defend himself against an accusation of wrongful conduct. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1980).

Model Rule 1.6(b) likewise obligates a lawyer to maintain client secrets, except when necessary to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm, or except when necessary to defend himself against allegations relating to the representation of his client. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1995). Rule 1.6(b) is explicitly subordinate to those provisions in the Model Rules requiring truthfulness in statements to others. *See id.*

²⁶ Gordon, *supra* note 6, at 506-507.

²⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1980).

²⁸ *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

ETHICAL CONSTRAINTS ON NEGOTIATORS

When the Model Rules were drafted, the ABA specifically rejected rules requiring absolute truth and fairness in negotiations.²⁹ Rules 4.2 and 4.3 of the January 30, 1980 Discussion Draft of the Model Rules of Professional Conduct dealt with the role of the lawyer as negotiator:

Rule 4.2 Fairness to Other Participants

(a) In conducting negotiations a lawyer shall be fair in dealing with other participants.

Rule 4.3 Illegal, Fraudulent or Unconscionable Transactions

A lawyer shall not conclude an agreement, or assist a client in concluding an agreement, that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work fraud or would be held to be unconscionable as a matter of law.³⁰

However, the Model Rules today contain no requirement of honest dealing. As stated earlier, the Model Rules as finally adopted “reflect a tension between maintaining the attorney-client privilege and determining under what circumstances an attorney can reveal otherwise privileged communications.”³¹ Model Rule 1.6, as proposed, required an attorney to reveal communications the lawyer reasonably believed necessary “to prevent the client from committing a . . . fraudulent act that the lawyer reasonably believe[d was] likely to result in . . . substantial injury to the financial interests or property of another”³² This rule did not treat privileged information as an absolute bar; an attorney was required to speak out to prevent substantial financial injury to another even if the client desired that the information not be revealed. “This rule, as proposed, enshrined the concept of fair dealing.”³³ The proposed fair dealing language was deleted, however, because the drafters feared that the proposed Model Rule would create too many inherent conflicts and

²⁹ See CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES* [hereinafter *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT*] 145 (1987).

³⁰ ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* 180 (3d ed. 1994).

³¹ Michael H. Rubin, *supra* note 6, at 452.

³² *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT*, *supra* note 29, at 48.

³³ Michael H. Rubin, *supra* note 6, at 452.

transform the lawyer "into a 'policeman' over a client."³⁴ These two separate and deliberate decisions by the ABA clearly show its desire not to interfere with the relatively informal negotiation process, and to leave it up to the profession to regulate and constrain its own behavior.³⁵

III. CALLS FOR HIGHER STANDARDS FOR ATTORNEYS AS NEGOTIATORS

The lack of ethical constraints dealing directly in the area of negotiation has caused a number of academics and practitioners to call for specific additions to both the Model Rules and Model Code.³⁶ The exact changes that each would propose to adopt varies, but the common underlying thread rests upon the belief that a form of good faith and fair dealing obligation needs to be imposed in order to insure that attorneys engage in negotiations ethically³⁷. Obviously, underlying this belief is the perception—perhaps misplaced—that the current ethical constraints imposed upon attorneys, both formal and informal, are completely inadequate.

First and foremost, it is important to illustrate exactly what provisions are being proposed as solutions to this perceived lack of proper ethical constraint in the negotiation process. As a possible solution, one professor has suggested the following duty be imposed upon attorneys acting as negotiators:

Obligation of Fairness and Candor in Negotiation:

When serving as an advocate in court a lawyer must work to achieve the most favorable outcome for his client consistent with the law and the admissible evidence. However, when serving as a negotiator lawyers should strive for a result that is *objectively fair*. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process. Consequently, whenever two or more lawyers are negotiating on behalf of clients, each lawyer owes the other an obligation

³⁴ THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 29, at 48.

³⁵ This assumes the absence of egregious conduct. *See* discussion *infra* Section II.A.

³⁶ *See supra* note 6.

³⁷ For an argument that a good faith and fair dealing duty should be imposed on precontractual negotiations, see Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70 (1993).

of total candor and total cooperation to the extent required to insure that the result is *fair*.³⁸

Presumably, in the eyes of their drafters, ethical standards such as this would go far toward insuring that overall negotiation processes would be relatively free from both deceit and "power-determinative" outcomes.

A. Professional Considerations

One of the greatest concerns that has prompted commentators to urge upon attorneys a higher standard of ethics during negotiation rests upon the belief that lawyers have a separate duty toward their profession.³⁹ This duty rests not upon the belief that attorneys have presumed advantages of education and social status; rather, this duty stems from the concept that, "as professionals, lawyers serve society's interests by participating in the process of achieving the just termination of disputes."⁴⁰ Following this line of reasoning, most would assert that an attorney's professional duties would not allow him to do anything that his client might do under the same or similar circumstances. In other words, a lawyer must be at least as candid and honest as his client is required to be and must not perpetrate the kind of fraud or deception that would vitiate a bargain if practiced by his client.

Beyond this minimal level of attorney conduct, commentators argue that the profession should embrace the same affirmative ethical standard for

³⁸ Steele, *supra* note 2, at 1403 (emphasis added). See also Alvin B. Rubin, *supra* note 6, at 589-591 (asserting that there are two precepts that should guide the lawyer's conduct in negotiations: honesty and good faith; and that a lawyer may not accept a result that is unconscionably unfair to the other party); *supra* notes 30-32 and accompanying text. According to one commentator:

If you would not do something in a courtroom context, if you would not make a misleading statement in a settlement conference with a judge, and if you would not remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you should not do any of these things in non-litigation negotiations, whether or not they take place prior to or after the filing of a lawsuit.

Michael H. Rubin, *supra* note 6, at 476. But see Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); White, *supra* note 20, at 927 ("The critical difference between those who are successful negotiators and those who are not lies in [the] capacity both to mislead and not to be misled.").

³⁹ See Alvin B. Rubin, *supra* note 6, at 589.

⁴⁰ *Id.*

attorneys' professional relationships with courts, other lawyers and the public.⁴¹ The rationale asserted for proposing this standard is that an attorney who deals with another member of his profession should be able to secure in the fact that his opponent is constrained by a principle of good conduct that is "morally binding" on the conscience of that individual.⁴² It is felt that applying this sort of honesty and good faith duty would allay fears such as those expressed by Eleanor Holmes Norton:

The Model Rules do not exempt negotiation from ethical constraints, but neither are the rules drafted to address the demands of bargaining with the same specificity that they address the demands of litigation. No rule or law requires fairness during negotiation In negotiation, where there is only the sparsest written guidance, the parties must decide for themselves what is legal, what is factual and what is ethical.⁴³

In short, commentators fear that with no specific, articulated rules of ethical conduct, attorneys would manipulate the rules of their behavior much like they were changing the rules of a game. It is this potential treatment of the negotiation atmosphere as merely a game—where ethical constraints can be shaded and altered according to perception—that have prompted commentators to press for a higher level of professional responsibility in this area.

It has also been suggested, as part of the overall obligation to negotiate fairly and in good faith, that attorneys "may not accept a result that is 'unconscionably unfair' to the other party."⁴⁴ Much like its commercial counterpart with respect to contracts,⁴⁵ an unconscionable settlement may result from a variety of circumstances. For instance, there may be such a

⁴¹ *See id.*

⁴² *See id.*

⁴³ Norton, *supra* note 5, at 529 (citations omitted).

⁴⁴ Alvin B. Rubin, *supra* note 6, at 591.

⁴⁵ *See* U.C.C. § 2-302 (1995). The basic test for a commercial contract is whether, in light of the general commercial background and the commercial needs of a particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. *See id.* off. cmt. 1. Under U.C.C. § 2-302, courts may pass directly upon the unconscionability of a contract at the time it was made and decide, if appropriate, to (1) refuse to enforce the contract, (2) enforce the remainder of the contract without a particular contract or clause or (3) limit the application of any unconscionable clause to avoid an unconscionable result. *See id.* § 2-302(1).

vast difference in the bargaining power of the principals that, regardless of the adequacy of representation, one party may not be able to withstand the expense of a protracted dispute or lawsuit.⁴⁶ In addition, there may be such a discrepancy in the bargaining skills of counsel that one is able to virtually manipulate the other at his will. Thus, an unconscionable result achieved under these circumstances would be created at least in part by the relative power, knowledge and skill of the principals and their negotiators. It is feared by commentators that attorneys, in attempts to “zealously represent their client, and possibly strengthen their own reputation, will always strive to exploit these balances of inherent bargaining power to the detriment of the ‘optimal’ social outcome of any given negotiation.”⁴⁷ Furthermore, it is believed that imposing affirmative duties to tell the truth and bargain in good faith would “reduce any relative inequality and produce results that commentators view as ‘within relatively tolerable bounds.’”⁴⁸

In addition to evaluating the relative strength of the principals and negotiators involved, part of determining whether a particular negotiated agreement is “unconscionably unfair” must necessarily rest upon the result alone. In the eyes of Judge Rubin, there comes a time when a deal is “too good to be true, where what has been accomplished passes the line of simply-a-good-deal and becomes a cheat.”⁴⁹ Thus, an attorney would have an affirmative duty not to accept agreements where the burden upon the opponent is “so unbearable that it represents a sacrifice of value that an ethical person cannot in conscience impose upon another.”⁵⁰

B. *Practical Considerations*

One of the predominant practical arguments for heightening the ethical duties imposed upon attorneys—from those in negotiation to that imposed before a tribunal in litigation—rests upon a comparison of the two separate settings. It is argued that “[n]egotiation of private settlements, like formal litigation, takes root in a set of circumstances giving rise to the assertion of rights by one party against another.”⁵¹ Lawyers come to the bargaining

⁴⁶ See SIMON & SCHWARTZ, *supra* note 30, at 168.

⁴⁷ Alvin B. Rubin, *supra* note 6, at 591.

⁴⁸ *Id.*

⁴⁹ *Id.* at 591–592.

⁵⁰ *Id.*

⁵¹ Gordon, *supra* note 6, at 514.

table, however, in an effort to avoid the cost and stress of trial.⁵² Unfortunately, in many cases, when negotiation fails, litigation results. With a potential trial acting as an ever-present backdrop for the negotiation proceedings, lawyers will often negotiate in a manner that contemplates litigation.⁵³ In negotiation, each attorney bargains with a "persuasive prediction of what a court would do were the case litigated, and from the confrontation of arguments emerges what the parties believe is a fair agreement."⁵⁴

Taking the comparison one step further, it is asserted that the lawyers involved offer versions of the facts in much the same way witnesses would at trial. Lawyers interpret facts and offer legal arguments for assigning or avoiding liability as they would in trial advocacy. They evaluate the legal merit of arguments like judges.⁵⁵ "And ultimately, based upon a concerted interpretation of the facts as governed by the applicable law, they decide who should pay whom and how much."⁵⁶ Given this proposed structure of the negotiation process, "lawyers achieve in settlement something far more significant than a resolution of conflict. They may determine the substantive legal rights of the parties, replacing [a] jury verdict with an alternative adjudication."⁵⁷ Thus, although the style and procedural format of litigation distinguish it from the relatively informal nature of private settlement negotiation,⁵⁸ the objectives and corresponding methodologies of the two processes are quite similar.⁵⁹ Thus, it has been asserted that, because of the

⁵² See Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 187 (1981).

⁵³ See Eisenberg, *supra* note 11, at 664-665.

⁵⁴ Gordon, *supra* note 6, at 514-515. Note that this theoretical analysis could also apply to precontractual negotiations as well, where individual negotiators can bargain over how they believe courts would interpret their contractual terms and precontractual behavior. See Bartlett A. Jackson & Auban Ann Eisenhardt, *Negotiations in Commercial Cases: Assess-Advise-Advocate*, 5 LITIG. 32 (1978) (describing the negotiation process as anticipatory trial advocacy).

⁵⁵ See Roger Fisher, Comment, 34 J. LEGAL EDUC. 120, 122 (1984).

⁵⁶ Gordon, *supra* note 6, at 516.

⁵⁷ *Id.*

⁵⁸ See Eisenberg, *supra* note 11, at 653-660.

⁵⁹ See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268 (1984).

On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation.

close similarity between the two processes, the same ethical constraints should be imposed upon both litigation and negotiation.⁶⁰

Furthermore, there are commentators that base their belief in higher levels of negotiation ethics on the inherent differences between the two processes of negotiation and litigation. Settlement and negotiation both call for advocacy, but different from the kind required before a tribunal. The advocate in negotiation presents his facts and arguments to the other party for agreement, rather than to a tribunal for a decision. "The difference is best perceived in terms of the assumptions that underlie advocacy in the judicial process of litigation and those which underlie the private process of negotiation."⁶¹ Litigation, it is argued, "assumes an irreconcilable conflict between the parties, that one party is wholly at fault, that one party must win, and that the end of the dispute is more important than the 'right' decision."⁶² Negotiation, in contrast, "assumes that the parties desire to reach an agreement, that each is fair-minded and willing to be convinced, that each will yield to a more reasonable view advanced by the other, and that the right decision requires a coordination of interests for their mutual benefit."⁶³

This differentiation between negotiation advocacy and trial advocacy is offered in an effort to show that negotiation is more accommodating and less adversarial in nature, and that lawyers in the negotiation setting should thus be held to a higher standard of ethics.⁶⁴ For example, it is asserted that the negotiator in the office and the advocate in the courtroom have two entirely different functions to perform, each of which requires a different standards. "The negotiator is dealing with the other party not as a plaintiff or a defendant, but as an individual person whose cooperation is desirable, and perhaps essential, to the best interest of his client."⁶⁵ According to this

There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call litigation, that is, the strategic pursuit of a settlement through mobilizing the court process.

Id. at 268-269.

⁶⁰ See Gordon, *supra* note 6, at 504.

⁶¹ L. RAY PATTERSON & ELLIOT E. CHEATHAM, *THE PROFESSION OF LAW* 121 (1971).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Gordon, *supra* note 6, at 515 n.62 (citing PATTERSON & CHEATHAM, *supra* note 61, at 123).

⁶⁵ PATTERSON & CHEATHAM, *supra* note 61, at 123.

line of thinking, there is only one basic standard for the lawyer's role as a negotiator honesty.⁶⁶

In support of this differentiation between litigation and negotiation behavior, a useful basketball analogy has been offered.⁶⁷ An official basketball game is conducted with the understanding that a third party will referee and adjudicate the legality of conduct exhibited by the players. Within this situation, players are free to flirt with the edges of acceptable conduct to gain an advantage over their respective opposition. They can do this secure in the knowledge that flagrant or egregious violations of the rules will be adjudicated and punished by an impartial third party. This has been asserted to be analogous to an attorney's conduct before a tribunal. In this setting, a lawyer has an explicit set of rules and an impartial third party to referee his conduct. Therefore, an attorney may flirt with the ethical and procedural boundaries, free to rely upon the third party to check any conduct that society would deem either illegal or unethical.⁶⁸

This situation is markedly different from an informal "pick-up" basketball game where no referees are present. Under these circumstances, the individual players need the cooperation and support from both their partners and adversaries in order to insure an organized activity. As a result, players have the responsibility of policing each other to insure that the rules are not violated. Thus, it is argued that players, in doing so, curtail their own behavior and place greater constraints upon themselves in order to enjoy the greater good of the game. The flirting with boundaries of acceptable conduct is replaced by participants acting safely within the boundaries of acceptable behavior to insure a more ordered and "ethical" game. This can be analogized to the negotiation setting, where the third-party tribunal is no longer present. It is here in this informal situation, much like the "pick-up" basketball game, that a greater set of ethical rules is argued to be necessary. With no ethical rules and no tribunal to referee their conduct, attorneys would be able to exercise conduct clearly outside the lines of acceptable ethical behavior.⁶⁹

⁶⁶ See *id.*

⁶⁷ See Thomas B. Metzloff, *Seeing the Trees Within the Forest: Contextualized Ethics Courses as a Strategy for Teaching Legal Ethics*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 227, 234-237.

⁶⁸ See *id.*

⁶⁹ See *id.*

IV. THE STATUS QUO AS AN ADEQUATE CONSTRAINT

Proponents of instituting stronger ethical rules on attorneys as negotiators have asserted a number of valid points in defense of their position. However, it seems that an incomplete understanding of the reality of the situation and all of its externalities lies deeply imbedded in their views.

A. Creation of Higher Ethical Standards for Negotiators Would Be Problematic

Standing firmly in the center of all disputes surrounding the ethical constraints imposed upon negotiators is the dilemma that these individuals face daily in their practice. This problem was addressed effectively in Professor White's article on negotiation ethics:

On one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled. . . . [A] careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions. . . . To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.⁷⁰

However, despite this reality, some commentators still would propose ethical rules outlawing deceptive statements that were natural—even necessary—elements of the negotiation process.

Some of the criticisms of deceptive negotiating tactics to further client interests get their impetus from the belief that such deceptive devices diminish the likelihood of Pareto optimal results,⁷¹ because “deception

⁷⁰ White, *supra* note 20, at 926–930.

⁷¹ The Pareto efficient point is defined as the point of allocation of resources where one person cannot make himself better off without making the other worse off. See ANDREW ALTMAN, *ARGUING ABOUT THE LAW* 153 (1996). For a more detailed explanation of this and other related concepts, see discussion *infra* Section V.

tends to shift wealth from the risk-averse to the risk-tolerant.”⁷² Even though this position is inevitably true from a practical standpoint, it is unlikely to discourage the predominant use of ethically permissible tactics that are designed to deceive risk-averse opponents into believing that they must accept less beneficial terms than they must actually accept.⁷³ Thus, it is unproductive to discuss a “utopian negotiation world” in which complete disclosure is the norm.⁷⁴ Arguably, making negotiations objectively fair and requiring complete and honest disclosure would break down the very essence of the informal negotiation process. The real question that should govern the debate surrounding truthfulness in negotiations concerns the types of deceptive practices that may ethically be employed to enhance bargaining interests.⁷⁵ Attorneys who naively believe that no deception is proper during bargaining encounters place themselves and their clients at a distinct disadvantage, because they permit their less candid opponents to obtain settlements and “transcend the terms to which they are objectively entitled.”⁷⁶

These important exceptions appropriately recognize that deceptive behavior is indigenous to most legal negotiations and could not realistically be prevented because of the nonpublic nature of most bargaining interactions.⁷⁷ Although the Model Rules unambiguously proscribe all lawyer deception, they reasonably permit mere “puffing” and dissembling regarding one’s true minimum position.⁷⁸ The fact that negotiation is nonpublic behavior would make any specific ethical rules extremely difficult to accept and monitor. If one negotiator lies to or deceives another in direct conflict with an “honesty and good faith” duty, only by chance will the other discover the deception. If the settlement is concluded by

⁷² Geoffery M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 7 (1987).

⁷³ See CRAVER, *supra* note 1, at 310.

⁷⁴ *Id.* at 310–311.

⁷⁵ See generally, e.g., Norton, *supra* note 5; Peters, *supra* note 72 (arguing that there exists an ethical difference between lies, which are prohibited, and other forms of deceptions, which are not); Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990).

⁷⁶ CRAVER, *supra* note 1, at 311 (citing Wetlaufer, *supra* note 75, at 1230).

⁷⁷ See *id.* at 312.

⁷⁸ See RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 151 (West 1984); Gary Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 KANSAS L. REV. 69, 101 (1982); see also discussion *supra* Section II.

negotiation, there will be no trial, no public testimony by conflicting witnesses and thus no opportunity to examine the truthfulness of the assertions made during the negotiation.⁷⁹ Consequently, in negotiation, more than in other contexts, ethical norms can probably be violated with greater confidence that there will be no discovery or punishment. Whether one is likely to be caught for violating a possible ethical standard says nothing about the merit of the standard. However, if the low probability of punishment means that many lawyers will violate the standard, the standard itself becomes even more difficult for the honest lawyer to follow. By doing so, the honest lawyer may be forfeiting a significant advantage for his client to others who do not follow the rules.⁸⁰

Another difficulty in drafting ethical norms is the gigantic scope of disputes that are subject to resolution by negotiation. Surely society would realistically expect and tolerate different forms of behavior from different negotiation situations. Performance that is standard in one negotiating arena may be considered tactless or conceivably unethical in another. More than any other form of behavior that attorneys engage in, the process of negotiation is varied; it differs in time, place and subject matter. It calls, therefore, either for different rules in different contexts or for rules stated only at a very high level of generality.⁸¹

Finally, any attempt to assert new ethical norms in the arena of legal negotiations must tackle the significant obstacle of enforcement. And for those that have proposed the imposition of a fairness standard, that obstacle seems insurmountable. For example, Professor Rubin admits that any attempt to evaluate his "unconscionably unfair" standard must necessarily involve an examination of the actual results of the negotiation⁸². To most observers, however, imposing such an objective ethical standard would be practically impossible.⁸³ Furthermore, stepping up the level of monitoring would be akin to making negotiations more like a "tribunal" and remove many of the benefits that have made it such an attractive informal dispute resolution mechanism.⁸⁴

⁷⁹ See White, *supra* note 20, at 927.

⁸⁰ See *id.* at 928.

⁸¹ See *id.*

⁸² Professor Rubin describes his unconscionably unfair standard as "whether the lesion is so unbearable that it represents a sacrifice in value that an ethical person cannot in conscience impose upon another." Alvin B. Rubin, *supra* note 6, at 591-592.

⁸³ See Gordon, *supra* note 6, at 528.

⁸⁴ See *id.* at 520-521.

B. Current Ethical and Legal Constraints Adequately Check Unethical Conduct

Even though attorney deception during legal negotiations does not always result in disciplinary action, courts have not been reluctant to take action when attorneys engage in questionable negotiation activity. Lawyer deception in negotiation can and does lead to discipline, to vacatur of settlement and to liability for fraud. For example, in *State ex rel. Nebraska Bar Association v. Addison*,⁸⁵ a lawyer negotiating the settlement of a client's hospital bill was found to have had a duty to tell the hospital administrator that his client had insurance potentially able to pay his bill.⁸⁶ Also, in *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*,⁸⁷ a Michigan court vacated a settlement where a plaintiff's attorney, knowing the defendant believed plaintiff would make an excellent trial witness, negotiated a final settlement agreement without disclosing that his client had died.⁸⁸ So while disciplinary and court actions against unethical attorney behavior in negotiations are not frequent, courts clearly have not hesitated to act against particularly egregious attorney conduct.⁸⁹

Practitioners must also recognize that other risks are created by truly dishonest bargaining behavior. "Attorneys who deliberately deceive opponents or who withhold information they are legally obliged to disclose

⁸⁵ 412 N.W.2d 855 (Neb. 1987).

⁸⁶ *See id.*

⁸⁷ 571 F. Supp. 507 (E.D. Mich. 1983).

⁸⁸ *See id.*

⁸⁹ *See Slotkin v. Citizens Cas. Co.*, 614 F.2d 301 (2d Cir. 1979) (holding defense lawyer liable for fraud in settlement of medical malpractice suit; the lawyer stipulated that "to the best of his knowledge" there was no excess insurance coverage when his client's files, which were in law firm's possession during trial, included letters from the excess carriers); *Price v. Superior Court*, 139 Cal. App. 3d 518 (1983) (holding defense counsel had duty to disclose to prosecutor that co-prosecutor had already refused plea bargain defense counsel was proposing). *Compare Kerwit Med. Prods. v. N & H Instruments, Inc.*, 616 F.2d 833 (5th Cir. 1980) (finding failure of plaintiff in patent infringement action to notify defendant of facts on which defendant could have fashioned a defense of invalidity did not amount to "fraud" such as would warrant vacatur of settlement), *with Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962) (vacating settlement of personal injury case where defendant's lawyer did not report an aneurysm that the defense's physician discovered in analyzing plaintiff because the duty to disclose arose once parties sought court approval of settlement).

may be guilty of fraud.”⁹⁰ Contracts procured through fraudulent acts of commission or omission, as well as those that are deemed unconscionable by law, may be voided with the responsible advocates and their clients possibly liable for monetary damages.⁹¹ In addition, “it would be particularly embarrassing for lawyers to make misrepresentations that could cause their clients additional legal problems transcending those the attorneys were endeavoring to resolve.”⁹²

Because the adversely affected clients might thereafter sue their culpable former counsel for legal malpractice, the ultimate injury to the reputations and practices of the deceptive attorneys could be monumental.⁹³ Legal representatives who employ clearly improper bargaining tactics may even subject themselves to judicial sanctions.⁹⁴

C. Professional Constraints on Unethical Negotiating Behavior

Most legal representatives conduct their negotiations with appropriate candor and without abusing their potential positions of power because they are moral individuals or believe that such professional behavior is already mandated by the applicable ethical standards.⁹⁵ For those who do not feel so ethically constrained, they would be wise to consider the practical professional risks associated with unquestionably deviant bargaining conduct.

Even if deceitful or “unconscionably unfair” action on the part of an attorney is not clearly unethical, is never reported to the state bar and never results in personal liability for fraud or legal malpractice, practical consequences often result.⁹⁶ It is likely that their aberrational behavior will eventually be discovered by their fellow practitioners in what is often considered a tightly-knit legal community. As other attorneys begin to realize that particular lawyers are not minimally trustworthy, future

⁹⁰ CRAVER, *supra* note 1, at 312–313.

⁹¹ See Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75, 86–94 (1985); Alvin B. Rubin, *supra* note 6, at 587.

⁹² CRAVER, *supra* note 1, at 313.

⁹³ Perschbacher, *supra* note 91, at 81–86, 107–112.

⁹⁴ See, e.g., *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985) (en banc).

⁹⁵ See CRAVER, *supra* note 1, at 313.

⁹⁶ See *id.*

interactions become more difficult for those practitioners.⁹⁷ For example, oral representations on the telephone and handshake arrangements are no longer acceptable, and executed documents are required even for the simplest of matters. More importantly, opposing negotiators will become more wary and distrustful of their opponents, making it more difficult for those who have gained a reputation as an "unethical" negotiator to obtain cooperative results for their clients in the long-term future.⁹⁸

Attorneys who contemplate the employment of unacceptable deception to further present interests should always be cognizant of the fact that such near-sighted conduct may seriously jeopardize their future careers. "No short-term gain achieved through deviant behavior should ever be permitted to outweigh the likely long-term consequences of those improper actions."⁹⁹

V. A MARKET VIEW OF ATTORNEY CONDUCT

One of the most important developments in legal thought during the last part of this century has been the application of economics to an ever-increasing range of legal fields and subjects.¹⁰⁰ While subject to a wide variety of criticism from its very inception, the economic analysis of the law has managed to attract steadily growing interest, both academic and professional.¹⁰¹ Taken one step further, the descriptive aspect of "law and economics"¹⁰² is extremely useful in analyzing attorney behavior and showing that the current ethical rules, along with practical and professional

⁹⁷ See J. KEITH MURNIGHAN, *BARGAINING GAMES* 230-231 (William Morrow ed., 1992).

⁹⁸ See Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 78-80 (1992).

⁹⁹ CRAVER, *supra* note 1, at 314.

¹⁰⁰ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* xix (1992).

¹⁰¹ See *id.*

¹⁰² ALTMAN, *supra* note 71, at 149-150. There are three separate theses belonging to the law and economics approach: the descriptive, the explanatory and the evaluative. The descriptive thesis holds that economic concepts and principles provide illuminating descriptions of legal rules and action. The explanatory maintains that economic concepts provide the best explanations for society's legal rules. Finally, the evaluative holds that economic principles provide sound criteria for evaluating legal rules and determining which ones are fit for society. See *id.*

constraints, are adequate to insure ethical attorney conduct during negotiations.

Rationality is one of the main concepts at the center of how the economic approach describes and explains human actions and institutions. From the view of economists, human action is essentially rational, and the rationality of any particular action is a product of that action's resulting costs and benefits.¹⁰³ Costs and benefits include, but are not limited to, monetary gain or loss. Various considerations that are nonmonetary can be marginalized and given a unit of measurement in order to evaluate its affect on cost-benefit analysis.¹⁰⁴

"According to the economic approach, each individual is the ultimate judge of what makes her better or worse off."¹⁰⁵ And, in the case of the attorney, they oftentimes have the duty of evaluating action that may or may not make their client better off. In other words, each person's preferences determine what counts as a cost or benefit for him. Thus, rational decisions reflect the net benefits of the decision (i.e., they reflect the gains (benefits) minus the losses (costs)). By focusing on marginal costs and benefits, one can determine when he has maximized his net benefits.¹⁰⁶ In the case of a negotiation, an attorney who contemplates a specific course of action or settlement proposal implicitly evaluates the costs and benefits involved, both to himself and his client, and will take that action when it maximizes his net benefit.

Proponents of new ethical constraints pertaining to negotiation conduct seem to have a pessimistic view of how attorneys evaluate their own conduct. In their minds, they see attorneys as a class evaluating negotiating decisions along strict lines that take into consideration only narrow short-term benefits to their clients and themselves. In other words, they seem to think that attorney behavior is mostly motivated by getting the largest fee possible and getting the best possible deal for one's client. Consequently, it is no wonder that this view of an omnipresent self-interest in the minds of attorneys has caused the proponents to suggest more constraints on their conduct.

In reality, the types of costs and benefits that attorneys must consider when evaluating their negotiation behavior is much greater. For example,

¹⁰³ See *id.* at 150-151 ("[c]osts and benefits refer to the entire range of considerations that make something better or worse for an individual.").

¹⁰⁴ See *id.* at 150.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 151.

when an attorney decides to accept a negotiated contract that is "unconscionably unfair," although not legally unconscionable, he has several ramifications that he should consider. While certainly this contract will have net benefits in the short-run, the same may not be true in the long-run. Opposing parties subject to such contracts will tend to either (1) perform the minimal obligations to the contract when they might have performed more out of good faith, or (2) breach the contract because the losses that the contract imposes are too great. In either event, each will result in greater costs (i.e., litigation costs or lost benefits) incurred by the client in the long run. Furthermore, any chance of a long-term relationship that is beneficial to both sides beyond the term of the contract may be negated by such an initially lopsided agreement. All of these costs are to be considered by the practicing attorney when evaluating whether or not to impose such terms upon an opponent, thus shifting the way in which the net benefits are determined.

Existing rules, although not as all-encompassing as desired by some, act as a deterrent to questionable behavior through the rational decisionmaking process. In most situations in life, it is not certain what the gains or losses will be from any given choice or action. Rational choice under such conditions or uncertainty is handled using the concept of expected benefits (or losses). The expected benefit of a choice is simply the benefit multiplied by the probability of its occurrence.¹⁰⁷ For example, if there is a ten percent chance of receiving ten dollars, then the expected benefit would be one dollar ($.10 \times \$10 = \1). Most economists would assert that this idea of rational action provides a good approximation of much human conduct, applicable across the spectrum of human activities.¹⁰⁸ Thus, this theory can be applied to the negotiator who engages in questionably ethical conduct. Every time an attorney behaves in such a way as to call the current ethical rules into question, there is the probability that his action will be construed as unethical, requiring disciplinary sanctions.¹⁰⁹ Clearly, an attorney deceiving another during negotiation may face this problem. The more egregious his deception, the more likely it will be interpreted as fraud and the greater the possibility of facing reprimand. Therefore, attorneys must consider this as a cost in determining what type of behavior they will engage in when negotiating. And while deceptive

¹⁰⁷ See *id.* at 152.

¹⁰⁸ See J. ROLAND PENNOCK, *ETHICS, ECONOMICS, AND THE LAW* 109 (J. Roland Pennock & John W. Chapman eds., 1982).

¹⁰⁹ See *id.*

action that is quite far removed from incurring penalties carries with it an equally small probability of being sanctioned, it has an effect as a liability in a cost-benefit analysis.

Finally, attorneys must consider long-term, professional consequences of their actions. No decision made during negotiations is limited to the parties at issue. Given a relatively small and tightly-knit legal community, it is likely that a lawyer will face either the same opponent in the future, or at least one who has knowledge of his reputation. Thus, deceptive or power-motivated practices in the present will cause future negotiation opponents to look more warily upon them and to be less likely to engage in conciliatory negotiations. This works to hurt both the attorney as a professional and his future clients that he must represent. As a result, lawyers must take into consideration these potential long-term costs or face the consequences that their actions will reap in the future.

A. *Practical Application*

1. *Hypothetical I*¹¹⁰

Lawyer represents Client, who was injured in an automobile accident. The Client's problems include a severe back injury. Lawyer, however, is not aware that Client sustained the back injury in a previous accident. Opposing counsel is likewise unaware of the earlier accident, and fails to learn of it during discovery. Lawyer files a complaint alleging that the present accident is the proximate cause of Client's back injury, and, still unaware of the injury's true origin, he begins negotiation. Before a settlement is reached, Lawyer learns of the earlier accident.¹¹¹

The author of the hypothetical, applying the Model Code, correctly concluded that the lawyer must counsel the client to correct the misrepresentation.¹¹² However, beyond that level of action on behalf of the attorney, Lawyer would not ethically be able to disclose the prior accident without Client's consent, because the information was acquired in the

¹¹⁰ See John L. Adams, Comment, *The Proposed Model Rules of Professional Responsibility: Disclosure of Clients' Fraud in Negotiation*, 16 U.C. DAVIS L. REV. 419, 430 (1983).

¹¹¹ Gordon, *supra* note 6, at 508 (quoting Adams, *supra* note 110, at 430).

¹¹² See *id.*; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980).

course of representation and is thus a privileged communication.¹¹³ In addition, because continued representation of Client would violate the duty not to engage in conduct involving dishonesty, fraud, deceit or misrepresentation,¹¹⁴ Lawyer would be obliged to withdraw from the representation.¹¹⁵ And when Client attempted to retain another attorney to handle his case, he would most assuredly neglect to inform his new counsel about his previous injury. Thus, from this it is argued that the current system is flawed and allows negative conduct such as this to go unchecked.

However, this argument tends to ignore a few practical checks and ramifications. First, if Attorney attempts to engage in negotiations based upon what he knows, it is possible that he will be found to have violated Model Rule 4.1 by making an intentional misstatement of a known fact to a third party, for which he can be disciplined. Furthermore, his refusal to answer questions pertaining to any previous accident involving his client for fear of violating Model Rule 1.6 will likely alert opposing counsel to possible misstatements on behalf of Client. Also, it is bordering on incompetence on the part of opposing counsel not to (1) thoroughly research Client's history and story, or (2) fail to question Attorney about the source of Client's injuries. The ramifications of such poor work on opposing counsel's part will likely result in either (1) making that attorney more thorough and astute during future engagements, or (2) costing that attorney future business among potential clients through word-of-mouth recommendations.

Even assuming in the worst case scenario, where, despite all of the potential checks in the current system, this type of conduct were to get through in this particular instance, the ramifications of altering these rules permitting disclosure would be disastrous. Developing a system where attorneys could be bound to reveal client confidences in such informal settings as negotiation would go far towards breaking down the attorney-client relationship. Clients would no longer feel that they could fully confide in their attorneys, knowing that possible disclosures to them, no matter how private, embarrassing or legally detrimental, could easily be disclosed under a "duty of honesty" rule in attorney conduct. In this hypothetical, imposing this new rule would do nothing but assure that Client would never allow Attorney to learn of the previous injuries in the

¹¹³ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (1980); Adams, *supra* note 110, at 430.

¹¹⁴ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1980).

¹¹⁵ See Adams, *supra* note 110, at 430.

first place. Even by limiting such a duty to only the realm of negotiations, the proverbial slippery slope would work slowly to erode the ideals of confidentiality and zealous representation that have become the touchstones of the legal profession.

2. *Hypothetical 2*

Lawyer (L) represents a large, well-established manufacturer (M) that produces widgets. Opposing counsel (OC), a young and inexperienced attorney, works for a small, upstart company (P) that produces an intermediate material necessary for M's production of widgets. While a number of producers perform the same function as P, P has developed and patented a new system that produces the intermediate material more cheaply and efficiently at a higher level of quality.

M desires to enter into a supply contract with P and instructs L to meet with OC to negotiate such a contract with the "most favorable terms he can acquire." Given M has much more economic power than P and L has much more skill at negotiating than OC, Lawyer proceeds to dictate the contractual terms to OC in creating the supply contract. In the end, a contract is agreed upon that is patently unfair and virtually negates any competitive market advantage that P held by virtue of its new production system.

At first glance, this would seem to be a situation where an added ethical fairness duty directed at negotiation would be appropriate. Assuming that this "lopsided" outcome was not unconscionable as a matter of law under the Uniform Commercial Code,¹¹⁶ it would appear to be appropriate for the ethical rules to step in and prevent such an unbalanced result from occurring. Applying the "unconscionably unfair" standard,¹¹⁷ Lawyer would arguably be found guilty of violating this ethical constraint. He would suffer punishment at the hands of the appropriate ethical board, thus serving as a model to deter future conduct of such an "egregious" nature. In essence, it is asserted by commentators that a fairness rule such as the one addressed here would effectively prevent attorneys from engaging in such questionably unethical negotiation conduct presented here.

However, attempting to impose such a "fairness" ethical constraint in situations such as this would be nearly impossible. First, negotiations such as the one at bar are largely nonpublic in nature, making it extremely

¹¹⁶ See *supra* note 45 and accompanying text.

¹¹⁷ Alvin B. Rubin, *supra* note 6, at 591-592; see also discussion *supra* Section II.

difficult to monitor.¹¹⁸ Second, assuming that questionable negotiation behavior could be caught, imposing a fairness standard upon them would be burdensome and extremely subjective. Calling upon ethical boards to delve into specific agreements, subjectively analyze their terms and weigh the competing strengths of each party would inevitably result in uneven and contradictory application of any type of "fairness" standard.¹¹⁹ Finally, commentators proposing such an ethical guideline assume that current restraints are not adequate to quell such negotiation behavior.

Clearly, social and ethical norms already in existence would serve to deter Lawyer's conduct in the above hypothetical. As alluded to above, society has already acted in passing rules to quell behavior that it deems to be the most egregious. It has done so in the form of Section 2-302 of the Uniform Commercial Code, which attacks contracts that are so one-sided that they qualify as "unconscionable" as a matter of law.¹²⁰ In addition, both Lawyer and his client will have to pay the price in the long run for their conduct. At worst, the small company (P) will decide to breach the contract in order to save itself long-term losses that resulted from the lop-sided contract, causing Lawyer's client M increased legal fees in the future. At best, P will perform under the provisions of the contract, but will realize how unfavorable the terms were, thus resulting in an increase of dissatisfaction in M. This "bad-will" will then have an adverse effect on any future contracts between the two parties. Finally, such "cut-throat" negotiation behavior by Lawyer will likely spread among his peers, causing fellow attorneys to negotiate in a more confrontational and antagonistic manner with Lawyer.¹²¹ This will inevitably hurt Lawyer's ability to garner better negotiated outcomes on behalf of clients in the future and, in turn, make it more difficult for Lawyer to attract clients.

Cost-benefit analysis on the part of Lawyer would act as an effective deterrent to engaging in "unfair" negotiation behavior. While an attorney who only considered the short-term gains to his client might very well enter into such a "patently unfair agreement," any rational attorney would have to consider the long-term ramifications both to himself and to his client. Cutting such a "cut-throat" deal with P would inevitably cause adverse results such as the ones enumerated above. Any competent attorney, especially one attempting to represent zealously the interests of his client,

¹¹⁸ See *supra* Section IV.A.

¹¹⁹ See *supra* notes 47-50 and accompanying text.

¹²⁰ See *supra* note 45 and accompanying text.

¹²¹ See discussion *supra* Section IV.C.

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must take into account these “costs” when evaluating what course of action to take.¹²² And while the benefits of such a lopsided contract may seem to outweigh the costs in the short-term, the opposite seems to be true for the long-term, especially when one considers Lawyer’s client’s desire to maintain a long-term relationship with P. So, while this form of analysis may not prevent all forms of questionable attorney conduct, it does, when combined with the established ethical constraints, adequately serve to deter questionable attorney conduct in the negotiation setting.

VI. CONCLUSION

Private negotiation is largely an informal process that goes relatively unregulated in terms of the ethical duties and constraints imposed upon attorneys. Aside from perpetuating a fraud or engaging in illegal activity, neither the Model Rules nor Model Code speak directly to the ethical rules governing attorney conduct in negotiations. But this is not to be misconstrued as an oversight on the part of the drafters; the American Bar Association’s House of Delegates expressly rejected specific rule proposals that would have placed greater restriction in this area. Rather, this lack of specific ethical rules should be seen as recognition that the negotiation process acts in an informal manner, separate and distinct from the formal, adjudicated settings that occur before a tribunal. In addition, it represents the significant emphasis placed upon the social and legal ideals of the adversarial setting and the attorney as the “zealous advocate” for his client.

Many commentators see this absence of controls on this increasingly important process as perpetuating abuse and injustice within our legal system.¹²³ In response, they have offered a number of proposals to be added to the current established framework of ethical restrictions on attorney behavior. In sum, these proposals center around placing a heightened ethical standard on the negotiation process; namely, to impose honesty, good faith and fairness standards to attorneys acting as negotiators. In support of their proposals, these commentators point to the injustices that can occur when one attorney deceives another or uses the power inherent in his particular position to his competitive advantage.

¹²² In addition, any client that is also a rational decisionmaker would have to take into consideration potential long-term costs associated with negotiating any agreement with another party.

¹²³ See Gordon, *supra* note 6, at 536.

However, the reality of the situation supports the notion that the status quo ethical constraints in negotiation are adequate to protect societal and legal interests. Admittedly, the formal rules of ethical conduct do not directly speak to negotiation behavior, and when they do, they only address the most egregious conduct. However, there are a number of other external factors apart from the vacuum of a particular negotiation setting that act as a check on such unethical negotiation behavior. Among these are the professional forces surrounding a particular attorney's practice, the developing cooperative nature of negotiation itself and the market forces that affect a negotiator's decision. Taken together with formal rules of ethics, these factors insure that ethical standards are met during negotiation, while still honoring the ideals of the adversarial process and the zealous advocacy of the client that are deeply imbedded within our existing legal system. Furthermore, it is apparent from analyzing these proposals that further good faith and fair dealing duties imposed upon the negotiation process would likely be unworkable and create more problems than they could solve.

Finally, this Note acknowledges the unanimous opinion among commentators that attorneys have a professional duty to conform to a higher level of ethical standards than the general public. However, that does not mean that formal ethical rules need to be created in order to interfere and impose ambiguous social norms upon the relatively effective, yet informal, practice of negotiation. This is especially true when one considers a situation where the professional places upon himself a higher and more efficient degree of ethical constraints in the negotiation process. When it comes to the issue of creating additional rules to govern this aspect of attorney behavior, perhaps this is a case where less is more.